Supreme Court, U. S.
FILED
JUL 22 1977
MICHAEL RODAK, JR., CLERK

No. 76-1683

In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL BARREL AND DRUM ASSOCIATION, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA AND THE
INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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The National Motor Freight Traffic Association, Inc., filed with the Interstate Commerce Commission a tariff supplement seeking to change the minimum specifications for steel drums acceptable in interstate commerce for the transportation of liquids by motor common carriers. The supplement authorized the use of a 55-gallon steel drum with 20-gauge steel sides and 20-gauge steel ends. Prior to the change, the lightest drum permitted by the tariff was one having 20-gauge sides and 18-gauge ends.

Petitioner protested the proposed supplement and asked the Commission to suspend it pending final determination of its lawfulness. The Commission determined not to suspend the supplement (Pet. App. D). Petitioner sought judicial review of the Commission's decision not to suspend. The court of appeals dismissed the petition for lack of jurisdiction (Pet. App. E).

The decision of the court of appeals is correct, there is no conflict among the circuits, and further review is not warranted.

The Commission's decision whether or not to suspend a classification or rate pending final determination of its lawfulness is a matter committed to the agency's exclusive discretion and is not subject to judicial review. *United States* v. *Students Challenging Regulatory Agency Procedures* ("*SCRAP I*"), 412 U.S. 669, 690-698; *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658.[1] In *SCRAP I* this Court not only reaffirmed the doctrine established in *Arrow Transportation Co.* that the Commission alone has the power to suspend rate increases, but also held that alleged noncompliance with the National Environmental Policy Act of 1969 does not supply the courts with authority to review suspension actions. 412 U.S. at 692-693.

[1] *SCRAP I* and *Arrow Transportation Co.* dealt with the Commission's authority to suspend rates and classifications under Section 15(7) of the Interstate Commerce Act, 24 Stat. 384, as amended, 49 U.S.C. 15(7), which pertains, *inter alia*, to rail carriers. This case concerns the authority of the Commission, under Section 216(g) of the Act, as added, 49 Stat. 559, and amended, 49 U.S.C. 316(g), to suspend rates and classifications filed by motor carriers. The Commission's authority under each of these provisions is similar (see Pet. 9 n. 3; Pet. App. A-2 to A-4), and the Commission's determination not to suspend a rate or classification under Section 216(g) of the Act also is unreviewable. *E.g.*, *Great Western Packers Express, Inc.* v. *United States*, 246 F. Supp. 151 (D. Colo.); *Movers' and Warehousemen's Ass'n* v. *United States*, 227 F. Supp. 249 (D. D.C.); *Consolidated Truck Service, Inc.* v. *United States*, 193 F. Supp. 773 (D. N.J); *Carlsen* v. *United States*, 107 F. Supp. 398 (S.D. N.Y.).

Contrary to petitioner's contention, the recent amendment to the Hobbs Act, which vests jurisdiction to review Commission decisions in the courts of appeals instead of the district courts (Pub. L. 93-584, 88 Stat. 1917), does not affect the holdings in *SCRAP I* and *Arrow Transportation Co.* The language and history of Sections 15(7) (rail carriers) and 216(g) (motor carriers) of the Interstate Commerce Act, 49 U.S.C. 15(7) and 316(g), under which the Commission is authorized to suspend rates and classifications (see note 1, *supra*), make plain that Congress "vested exclusive power in the Commission to suspend rates pending its final decision on their lawfulness, and [has] deliberately extinguished judicial power to grant such relief." *SCRAP I*, *supra*, 412 U.S. at 691. The amendment to the Hobbs Act did not amend Sections 216(g) or 15(7) and was not intended to affect the reviewability of suspension determinations made under those provisions.[2]

[2] Wholly apart from a concern that review by several district courts might have led to inconsistent results, Congress' decision to preclude judicial interference with "no-suspend" orders stems in large part from pragmatic needs of the affected carriers and the Commission for expedited and orderly, yet necessarily informal, suspension proceedings. See *SCRAP I*, *supra*, 412 U.S. at 697-698; *Arrow Transportation Co.*, *supra*, 372 U.S. at 662-672. Such proceedings under Part II of the Interstate Commerce Act are limited in scope and not governed by formal procedural requirements. Findings of fact in the usual judicial sense are not made, subpoenas cannot be issued, and evidentiary statements are not required to be verified under oath. The decision whether or not to suspend is reached after only "a brief and informal hearing." *Arrow Transportation Co.*, *supra*, 372 U.S. at 672.

Indeed, where the Commission decides not to suspend, the courts have held that no findings articulating its reasoning need be provided. *Oscar Mayer & Co.* v. *United States*, 268 F. Supp. 977, 980-981 (W.D.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1977.

Wisc.); *Freeport Sulphur Co.* v. *United States*, 199 F. Supp. 913, 916 (S.D. N.Y.); *Bison Steamship Corp.* v. *United States*, 182 F. Supp. 63, 66 (N.D. Ohio). Moreover, even where the Commission decides to suspend a rate or classification, Section 216(g) merely requires "a statement in writing of [the agency's] reasons for such suspension." This requirement is satisfied by the simple statement that the proposal would result in rates, charges, or classifications that would be "unjust and unreasonable." *Port of New York Authority* v. *United States*, 451 F. 2d 783, 786 n. 16 (C.A. 2).